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Supreme Court, U.S.
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No. 10-1028

In the

Supreme Court of the United States

JAMES T. PANAGOS, LLC,

Petitioner,

v.

GINA MARIE HOUSKA,
Personal Representative of the
Estate of Jeffrey A. Houska, Deceased,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

REPLY BRIEF

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STATEMENT OF THE CASE

In her argumentative Statement of the Case, respondent accuses petitioner of "sleeping on its claim. . . ." Brief of Respondent in Opposition,[1] p. 1 Not only would this fact, if true, be wholly irrelevant to the state action and due process issues presented by this petition, but the record is entirely devoid of any evidence of what efforts petitioner made or did not make, short of presenting its bill to the decedent and filing its claim in probate, to collect its bill. Because the case below was resolved at the pleading stage (Appendix to Petition for a Writ of Certiorari at page[2] 1a–9a, 17a–30a), other than petitioner's presentation of the bill to decedent, there was no evidence below concerning petitioner's billing and collection activities.[3] Contrary to respondent's assertion that petitioner slept on its claim, it is just as possible that petitioner diligently mailed monthly statements to decedent's home and that respondent simply ignored them. Neither factual proposition is supported by the record. Respondent's unfair, but clever, suggestion is simply a distracting "blame the victim" argument.[4]

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[1] Abbreviated hereinafter as "Resp. Brief."

[2] Abbreviated hereinafter as "App."

[3] In the affidavit which James T. Panagos gave (App. 24a–25a) in support of petitioner's motion for rehearing (App. 20a–21a), he stated that petitioner did furnish its invoice "directly to decedent" (App. 14a ¶5).

[4] Respondent failed to give actual notice of the death of her father and of her appointment as the personal representative of his estate (App. 25a ¶¶'s 7 and 8), a notice that she has conceded (App. 2a–3a, fn. 2) she might have been required to give

Though respondent accurately states that all other state courts of last resort that have considered statutes similar to Missouri's probate statute of repose, Mo.Rev.Stat. §473.444 (2000), have upheld them (Resp. Brief, p. 2), she fails to plainly say that "all other" courts consists of only two: Colorado and Indiana. She also fails to point out how these two state court opinions just skim the surface in their analysis of whether such statutes violate due process. *See* discussion below at pp. 4–6.

Respondent overlooks the statutes of many jurisdictions in claiming that this Court's decision in this case "would directly affect only 16 state statutes." Resp. Brief, p. 2. *See* discussion below at p. 3.

Respondent correctly, but again in a fashion both argumentative and irrelevant to the issues before this Court, states that "[t]he amount of the claim is *only* $1,498.75." Resp. Brief, p. 3 (emphasis added)(footnote omitted).[5]

Respondent quibbles that petitioner misdescribed her petition for a writ of prohibition or mandamus, filed in the Missouri Supreme Court, by which she sought an order prohibiting the probate court from

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nnder the Missouri nonclaim statute, Mo.Rev.Stat. §473.360 (2000), ın light of *Tulsa Professional Collection Services, Inc v. Pope*, 485 U.S. 478 (1988).

[5] Overlookıng the body of the claım ıtself (App. 28a) which correctly states this amount, respondent accurately observes that the invoice attached to the claim (which has itemized charges which total $1,498.75) has a typographical error ın its total.

proceeding on petitioner's claim, as an "interlocutory appeal." Resp. Brief, p. 3. Though the correct characterization of the method by which she sought review of the probate court's refusal to dismiss this claim on her motion is irrelevant to any issue before this Court, it might have been more precise to describe the procedure she invoked as "[i]nterlocutory review by writ of prohibition. . . ." *Polish Roman Catholic St. Stanislaus Parish v. Hettenbach*, 303 S.W.3d 591, 598 (Mo.App. E.D. 2010).

As respondent correctly implies, because petitioner's claim was disposed of on the pleadings as a matter of law, the facts touching on whether petitioner was a known or reasonably ascertainable creditor and whether respondent gave it actual notice have never been fully adjudicated. Resp. Brief, pp. 5–6. Nonetheless, these facts are irrelevant to the two legal issues presented by this petition.

REASONS FOR GRANTING THE PETITION

A. The Petition Raises an Important Question of Federal Constitutional Law

Ignoring the statutes of fifteen states and other jurisdictions, respondent tries to minimize the national significance of the issues raised by this petition. *Compare* Resp. Brief, pp. 6–7, fn. 5 *with* Petition, pp. 26–29, fns. 12–14. She focuses only on those state statutes of repose which establish a deadline no longer than the Missouri one-year period (Resp. Brief, p. 7, fn. 5) without seeming to appreciate that the

constitutionality of these statutes turns not upon the length of time after death within which a creditor may file a claim, but rather on whether, absent notice to a known creditor, such a statute, which cuts short the otherwise-applicable statute of limitations, is constitutional.

Though she was untroubled in seeking relief in the Missouri Supreme Court, rather than defending, and, possibly, paying, this claim in the probate court, respondent now argues that, because petitioner's claim is for a small amount, the petition somehow cannot raise an important federal question. Resp. Brief, p. 7. Respondent fails to alert this Court and counsel to any precedent or logic to suggest that a "state [may] deprive [a] person of . . . property, without due process of law. . . ." so long as that property is of a small value. U.S. Const. amend. XIV, §1.

B. Decisions of Other States

While respondent is correct in observing that the decisions of other state appellate courts have upheld statutes similar to Missouri's probate statute of repose, Mo.Rev.Stat. §473.444, she fails to recognize why the flawed and often superficial analyses found in those opinions is so unpersuasive. *Compare* Resp. Brief, pp. 8–10, *with* Petition, pp. 22–26. In ballyhooing the unanimity of state courts of last resort, Resp. Brief, pp. 2, 8–9, respondent neglects to tell us that there are only two such opinions, other than the case at bar.

In *Denver Water Department Credit Union v. The Estate of Ongaro*, 998 P.2d 1097,1105-06 (Colo. banc 2000), the court described a statute that cuts short the

otherwise-applicable statute of limitations after the expiration of certain period of time after a decedent's death as "a nonclaim statute, not a statute of limitations." Yet, it failed to appreciate how such a statute, which enforces a deadline triggered by an event often known only to the personal representative of the estate but not to the creditor, differs from the deadline created by a statute of limitations, where the facts giving rise to the accrual of the cause of action are known to the plaintiff.

Likewise, respondent fails to acknowledge that, though the court in *Estate of Decker v. Farm Credit Services*, 684 N.E.2d 1137, 1137–39 (In. 1997), also recognized that a statute that cut off claims after the passage of a certain period of time after the decedent's death was not a statute of limitations, it ruled without any examination or analysis of how such a statute differs from a statute of limitations.

Respondent mistakes the opinion of the Court of Special Appeals of Maryland in *Ohio Casualty Insurance Company v. Hollowell (In Re Estate of Auguste)*, 94 Md.App. 444, 617 A.2d 1134, 1136–38 (1993), as the opinion of a state court of last resort. Resp. Brief. p. 8–9. Actually, this is an opinion of an intermediate appellate court, as the Court of Appeals of Maryland is the highest court of that state. Respondent overlooks the *Hollowell* court's failure to appreciate the critical difference between a statute of limitations and a probate statute of repose: the facts that start the clock of a statute of limitation are known to a plaintiff, whereas the fact, the death of the debtor, that starts the clock of a statute of repose might often be unknown to a creditor.

Respondent misstates the holding of *May v. Illinois National Insurance Company*, 771 So.2d 1143 (Fla. 2000), in asserting that it held that a statute which cut off claims two years after the death of a decedent did not violate due process, as there was no state action. Resp. Brief, p. 9. Notice and due process were not at issue in this case, a case in which the claimant was painfully aware of the decedent's death, because the decedent had died at the scene of an automobile collision that also caused injuries to the claimant and the death of the claimant's wife. *May*, 771 So.2d at 1145–48. Though it quoted a lower court opinion that described the legislature's purpose as crafting a "self-executing period of repose – without significant action by the state itself," *Id.* at 1155, it never reached these state action and due process issues itself. Instead, the opinion focused on whether the two-year period could be waived. *Id.* at 1154–61.

Respondent neglects to mention that two of the opinions of state intermediate courts of appeal, which she cites with approval, are factually distinguishable, because the creditors were aware of the decedent's death: *Roddy v. Hamilton County Nursing Home (In re Estate of Key)*, No. 03A01-9810-CH-00319, 1999 WL 172675 (Tenn. Ct. App., Mar. 24, 1999), 1999 Tenn.App. LEXIS 201, and *Society National Bank v. Johnson*, No. 72002, 1977 SL 781741 (Ohio App. 8 Dist., Dec. 18, 1997), 1997 Ohio App. LEXIS 5682. None of the others which she cites delve into the glaring difference between a probate statute of repose and a typical statute of limitations. *Compare* Resp. Brief, pp. 9–10 *with* Petition, pp. 24–26. Thus, they are of little guidance in a proper and thorough constitutional analysis.

C. The Opinion of the Missouri Supreme Court Misinterprets the Decisions of This Court

Respondent misreads and misapplies both *Pope*, 485 U.S. 481-87, and *Texaco Inc. v. Short*, 454 U.S. 516 (1982), in arguing that the opinion below is consistent with these precedents. Resp. Brief, pp. 11–16.

She begins her incorrect analysis by mislabeling Mo.Rev.Stat. §473.444 as a "statute of limitation." Resp. Brief, p. 12. In truth, it cannot accurately be so described; rather, it is a statute of repose that extinguishes a claim at a certain time regardless of how much time yet remains, measured from the date of the accrual of the cause of action, under the applicable statute of limitations. Petition, pp. 13–14. She acknowledges that this Court, in *Pope*, did not decide how to characterize "nonclaim statutes that run from the date of death. . . ." *Pope*, 485 U.S. at 488. Even so, without any analysis, indeed without any logical explanation, she characterizes such a statute as a "statute of limitation." Resp. Brief, p. 12. Based on this leap of logic, she then comes to this insupportable conclusion: "the statute is a self-executing statute of limitations, and this Court made its holding in *Pope* expressly inapplicable to such self-executing statutes. . . ." *Id.*

Correctly stated, this is a statute of repose, not a statute of limitations, and *Pope* expressly declined to decide the constitutionality of such statutes, as there was none at issue in that case. *Pope*, 485 U.S. at 488. *Pope*'s ruminations about self-executing statutes of limitations are *dicta*, *dicta* that is only helpful if one

first decides whether the statute at issue can be fairly described as a statute of limitations at all. *Id.*, 485 U.S. at 486–88. Because it cannot, *Pope*'s *dicta* shines little light on the questions at hand.

Respondent's analysis again falters in her comparison of the facts of *Short*, 454 at 518–22, to those of the case at bar. Resp. Brief, pp. 13–16. She correctly notes that the Court in *Short* observed that the owner of the mineral interests is presumed to know that the law required it to file a statement regarding its ownership in the county office before the expiration of a period of twenty years of nonuse. *Id*, at 531–34. But, she then argues that "[l]ikewise, a creditor in Missouri is presumed to know that, if its debtor dies, the creditor then has a year to pursue its debt." Resp. Brief, p. 15. In writing this, she fails to appreciate the stark difference between knowledge of the law and knowledge of the facts. While everyone is presumed to know the law, and while the mineral owner knows when he last exploited the land to extract its contents, the creditor cannot be presumed to know the fact of the decedent's death. Justice and fair play demand that the personal representative tell this fact to a known or reasonably ascertainable creditor.

To complete her distorted analysis, respondent again blames petitioner for doing "nothing to protect its claims for 2½ years." Resp. Brief, p. 16. Nothing in this record supports this irrelevant, specious, and misleading contention. *See* discussion *supra* at p. 1.

D. The "Self-Executing" Fallacy

Never acknowledging that Mo.Rev.Stat. §473.444

is not a statute of limitation, respondent next addresses what it means to say that a statute is "self-executing." Resp. Brief. pp. 16–19. In her facile dismissal of the state action analysis offered by Professor Mark Reutlinger in *State Action, Due Process, and the New Nonclaim Statutes, Can No Notice Be Good Notice If Some Notice Is Not?*, 24 Real Prop. Prob. & Tr. J. 433 (1990), respondent again confuses the issue by describing the Missouri statute as a common "statute of limitation." Resp. Brief, p. 18. Her refusal to admit that this statute is more accurately described as a statute of repose that supercedes the applicable statute of limitation blinds her to seeing that Reutlinger's state action analysis of *Pope* and *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), persuasively explains how best to apply those precedents to the consideration of a probate statute of repose.

In *Flagg Brothers*, 436 U.S. at 166, this Court held that the choice of a private person, a warehouseman, to conduct a private sale of bailed goods, as authorized, but not required, by state law, was not state action. In *Pope*, this Court held that the enforcement of a probate nonclaim period, triggered by the publication of notice of the opening of an estate and the probate court's appointment of a personal representative, was state action. 485 U.S. at 485-88.

Reutlinger notes that the *Pope* nonclaim period would never have begun if an interested private person had never commenced the administration of the estate. Reutlinger at 449. He observes that, in the commencement of the time period established by a probate statute of repose that runs from the date of the

decedent's death, there is no comparable private conduct. *Id.* Instead, it is simply the state which creates the deadline and later enforces it. *Id.*

So, if anything, Reutlinger persuasively concludes, there is more state action present in the operation of a probate statute of repose that runs automatically from the date of death than there is in the operation of a probate nonclaim statute that is begun only after some individual invokes the assistance of the probate court. *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2011